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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; FERNANDO E.C. DeBACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION,

Appellants,

v.

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

(Continued on inside front cover)

DON B. KATES, JR.
BRUCE N. BERWALD
PETER H. REID
CARL L. MCCONNELL
Legal Aid Society of San Mateo County
2221 Broadway
Redwood City, California 94063

JOHN GANT
ALBERT H. MEYERHOFF
DIANE S. GREENBERG
California Rural Legal Assistance
Cooperative Legal Services Center
1212 Market Street
San Francisco, California 94102

Attorneys for Appellees

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

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Appellants,

v.

CONCETTA SALFI and DOREEN A. KALNINS,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Whether the statutory provisions invalidated below[1] are a conclusive presumption which deprive appellees[2] of Due Process?

2. Whether the nine-month conclusive presumption is an arbitrary and unreasonable classification which violates the Fifth Amendment?

3. Whether sovereign immunity bars an award which requires federal officials[3] to correct the past effects of the enforcement of an unconstitutional statute?

4. Whether 42 U.S.C. 405(g)'s waiver of sovereign immunity as to suits for Social Security benefits applies to suits in which the administrative remedy also provided by that section was not exhausted because it can not resolve constitutional claims?

5. Whether, in the circumstances of this case, and in light of their legislative history, sovereign immunity should be held to bar actions arising directly under the United States Constitution, or under 28 U.S.C. §§1331, 1343, 1361 or the Administrative Procedure Act?

6. Whether this case exhibits the extraordinary characteristics which justify departure from the normal expectation that judicial decisions will have retrospective application?

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[1]Title 42 U.S.C. 416(c)(5) and (e)(2), hereinafter jointly denominated "the nine-month conclusive presumption."

[2]Appellees, respectively the widow and stepdaughter of the late Londo L. Salfi, are hereinafter denominated "the Salfis."

[3]Appellants, who include the Department of Health, Education and Welfare and various of its employees and those of the Social Security Administration, are hereinafter jointly denominated "SSA."

7. Whether SSA waived whatever class action objections it might have had when it mapped out the certification procedure, and stipulated to the class allegations of the complaint, to which it subsequently objected only after the substantive issues were decided to adversely do it?

SUMMARY OF ARGUMENT

Conclusive Presumption Argument: Title 42 U.S.C. §416(c)(5) and (e)(2) erect a conclusive presumption that where a wage earner dies of natural, non-accidental causes within nine months after his marriage, that marriage was a sham entered into in contemplation of his death for the purpose of qualifying his widow for Social Security survivorship benefits. A conclusive presumption violates Due Process unless: (1) the presumed facts are universally true; or (2) no reasonable alternative exists for individualized determination of the actual facts; or (3) the statute really represents a substantive rule of law rather than a purely evidentiary presumption. None of these factors is present here, for: (1) in the vast majority of cases, a bridegroom's death through heart attack or other illness within nine months after marriage is a wholly unforeseen calamity rather than the denouement of a conspiracy entered into in knowledge that he was terminally ill; (2) reasonable alternative means exist for individualized determination of the actual facts, most notably the accessibility of proof as to the health and life expectancy of the wage earner prior to marriage; (3) in light of its history and the surrounding legislative scheme, no substantive policy

purpose can be (or has been) realistically suggested for the nine-month conclusive presumption.

Equal Protection Argument: The nine-month conclusive presumption denies Equal Protection in that it is both incredibly overinclusive and substantially underinclusive. The statute is overinclusive in that the vast majority of applications it excludes are based upon the wholly unexpected death of the wage earner within nine months of marriage, rather than sham marriages. It is an underinclusive classification in that benefits are available to the "survivor" of a sham marriage if the wage earner manages to hang on for nine months or more.

Sovereign Immunity Argument: Sovereign immunity should not be held to bar a judgment nullifying the effects of an unconstitutional statute. Unlike the 11th Amendment with which *Edelman v. Jordan*, 415 U.S. 651 deals, federal sovereign immunity is a wholly judicial construct. As such it is subject to abrogation or limitation by this Court in light of modern jurisprudential thought which uniformly regards sovereign immunity as a grotesque anarchronism. Moreover, SSA's purported sovereign immunity argument is really a convoluted and unmeritorious claim that an administrative remedy was not exhausted. By enacting 42 U.S.C. §405(g) Congress has waived sovereign immunity from suits for Social Security benefits. SSA contends that waiver is inapplicable to this case because the administrative remedy provided in §405(g) was not exhausted—even though SSA would (and did) refuse to decide the constitutional claims involved in this case. SSA has suffered no detriment from the failure to exhaust administrative remedies, and it should be held

that §405(g) waives sovereign immunity without such exhaustion where the remedy is in fact unavailable or refused.

Appropriateness of Retroactive Benefits: This case does not have the extraordinary characteristics which *Chevron Oil Co. v. Huson*, 404 U.S. 97 cites as overriding the normal expectation of retrospective application of judicial decisions. There is nothing novel about either the conclusive presumption doctrine or its application to the Social Security Act. Far from being inconsistent with retroactive benefits, the Social Security Act (as implemented by SSA's own regulations) provides for them in cases of erroneous benefit denial. 20 C.F.R. §404.957. The ordered reexamination of the class' benefit applications would not deplete the Trust Fund since Congress can simply appropriate additional money into it to cover the additional number of recipients. This is something which is required whenever circumstances result in an influx of benefit applications beyond those anticipated in the yearly appropriations which Congress votes according to SSA's estimates.

Class Action Issues: SSA appears no longer to press any disputed class action issues. The parties seem agreed that the judgment below properly binds both the class and SSA, requiring the latter to give notification to all persons previously denied benefits of their entitlement to reapply for prospective benefits. (SSA maintains its objections to *retroactive* class relief, but these apparently rest solely upon sovereign immunity, rather than class action, grounds.) In any event, SSA waived all class action objections below when it helped map out the certification procedure (and stipulated to the class action allegations of the Complaint) to which it subsequently objected only after the substantive issues were decided adversely to it.

ARGUMENT [CONSTITUTIONAL QUESTION]

I.

THE PURPOSE OF THE SOCIAL SECURITY ACT PROVISIONS INVALIDATED BELOW.

A. The Nine Month Conclusive Presumption Was Established to Exclude Short-Term Sham Marriages Entered Into in Expectation of the Wage Earner's Imminent Death.

The nine-month conclusive presumption is part of a comprehensive legislative scheme devised against the possibility that a terminally ill wage earner might offer, or be induced, to enter into a sham marriage to make the woman (and any children she might have of a former marriage) eligible for survivorship benefits after his death.[1] Thus, where the wage earner dies of an

[1]The legislative purpose is apparent not only from the statutory scheme, but from explicit statements to be found in the 1967 Senate Report which accompanied the enactment of the challenged provisions of §416 and the 1972 House Report which accompanied the enactment of certain amendments to that section. The latter report is quoted in the opinion below (J.S. App. p.5a), while the former, which is almost identically worded, is quoted at p.2, n.1 of plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment (etc.) in the court below. That quotation is taken from p. 2933 of the 1967 U.S. Cong. News & Admin. Rep. (v.2).

SSA's Opening Brief, pp. 8-9 and n.5 cites, but does not quote, apparently similar statements of intent from testimony before the Congress of 1938 which originally enacted a one-year conclusive presumption which was the predecessor of the provisions here challenged. Although, as will appear, SSA may

(footnote continued)

illness or disease (or other non-"accidental" cause) within nine months after marriage, the nine-month conclusive presumption bars his widow and/or stepchildren from receiving survivorship benefits. Under another sub-section of §416, this nine-month rule is inapplicable if the wage earner's death was "accidental."[2] But even where the death was accidental, survivorship benefits are not available if HEW "determines that at the time of the marriage involved, the individual could not have reasonably been expected to live for nine months."

Both Congress and this Court are familiar with instances in which persons entered into temporary sham marriages in order to qualify for benefits which Congress has provided as an incentive (or at least made available) to genuine marriage. *See e.g. Lutwak v. United States*, 344 U.S. 604, 611 dealing with the attempt to counterfeit marriages between aliens and United States citizens in order to secure American residency for the former. In defining the essence of the fraud there involved, the opinion compares "fake marriages in which neither of the parties ever intended to enter into the marital relationship . . . and were never to live together as husband and wife" to "the common understanding of a marriage, which Congress must have

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construe the purpose of these provisions somewhat more broadly than do the Salfis, it is agreed that, at the very least, they were intended to exclude fraudulent applications based upon sham marriages entered into in contemplation of the wage earner's imminent death.

[2]Title 42 U.S.C. 416(k) which defines an "accidental" death as one caused "solely through violent, external and accidental means."

had in mind when it made provisions for 'alien *spouses*' in the War Bride's Act [which] is that the two parties have undertaken to establish a life together and assume certain duties and obligations." (Emphasis in original). This Court went on to rephrase and cite with approval the holding of a lower court case that, whatever the legal formality, there is in fact no marriage where "there was no good faith—no intention to marry and consumate the marriage even for a day."[3]

B. Congress did not Intend to Exclude Benefit Applications Based Upon a Genuine Permanent Marital Relationship Motivated by Economic Considerations Even Including the Possibility of Obtaining Survivorship Benefits.

Although generally concurring in the foregoing analysis, certain ambiguous language in SSA's Opening Brief may be intended to suggest that the nine-month conclusive presumption has an even broader purpose: To exclude not only sham marriages, but even long-term genuine marriages entered into without knowledge that the wage earner was terminally ill if the marriage was motivated by the possibility of eventually securing survivorship benefits. This is to make the rather unlikely assertion that Congress, having provided

[3]344 U.S. at 613. See also Johl v. United States, 370 F.2d 174 (9 Cir. 1966) (marriage undertaken to secure alien's American residency; marriage never consumated and parties never cohabited) and Ferrante v. Immigration and Naturalization Service, 399 F.2d 98 (6 Cir. 1968) (marriage undertaken to secure alien's American residency; marriage never consumated although alien did temporarily reside—on couch—in the house which his "wife" shared with her paramour).

certain benefits, sought to bar those who sought fully and genuinely to meet the eligibility requirements. No reason (other than the talismanic phrase "to protect Trust Fund") is given to explain why a legislative body which has repeatedly provided economic incentives for genuine marriage would seek in this situation to exclude those who had been influenced by such considerations in deciding to marry.

More important, no reason is given why, if this is the purpose, the nine-month conclusive presumption is not applied where the wage earner's death was "accidental." The obvious reason for this difference in treatment—that an accidental death is not foreseeable while a death through illness may be—demonstrates that the congressional intent was to bar applications based upon marriages which were entered into as temporary expedients in contemplation of the wage earner's imminent death. This intent is made express by §416(k)'s prohibition of survivorship benefits even in accidental death cases where HEW "determines that at the time of the marriage involved, the individual could not have reasonably been expected to live for nine months."

C. Congress Did Not Devise the Nine-Month Conclusive Presumption as a Test of Whether the Widow and Child had Become Economically Dependent Upon the Wage Earner Before His Death.

Departing entirely from anything in the legislative history, SSA attempts to justify the nine-month conclusive presumption as a test of whether the wife

and/or stepchildren have become dependent upon the wage earner. That a nine-month hiatus might have been adopted for this purpose seems superficially plausible until attention is again turned to the fact that the nine-month conclusive presumption does not apply if the death was accidental. Surely Congress did not believe that whether and to what extent a wage earner's wife and/or stepchildren become dependent upon him after marriage turns upon the causation of his death.

Moreover, the dependency rationale is inconsistent with both the general theory and specific other provisions of the Social Security Act. As applied to children or stepchildren, the dependency rationale would render the nine-month conclusive presumption a redundancy, since Congress has chosen to directly test a child's economic dependency by making it an eligibility requirement which the child must satisfactorily prove before receiving benefits.[4] On the other hand, it has never been the policy of the Social Security Act to impose any test of dependency for widows. Far from requiring dependency of a wage earner's surviving wife, Social Security provides survivorship benefits where, at the time of his death, his wife's earnings or property exceed his own or even where the wage earner was entirely dependent upon her support. Obviously, if Congress had wished (contrary to the previous policy of the Act) to test a widow's dependency, it could have adopted, as it had for children, stepchildren and

[4]Title 42 U.S.C. §402(d) reads in pertinent part: "Every child (as defined in §416(e) of this title) of . . . an individual who dies a fully or currently insured individual [is eligible for survivor's benefits] . . . if such child, . . . (C) was dependent upon such individual. . . .

divorced ex-wives,[5] the simple, obvious and direct means of requiring actual proof of such dependency as a condition of eligibility rather than by imposing an inefficient nine-month conclusive presumption.

Finally, a nine-month hiatus to establish economic dependency is irrational since if a woman and/or her children by a former marriage become dependent upon a new spouse at all, they generally do so at the time of the marriage. If the dependency results from a cessation of welfare, alimony, child support or pension rights, this occurs at the time of marriage. If, on the other hand, dependency arises because the wife voluntarily leaves her employment, this most probably occurs before the wedding and honeymoon, as a result of premarital discussion between the marriage partners. In any case, a presumption that a widow and/or stepchildren do not become dependent upon the new spouse for nine months after marriage is itself an evidentiary conclusive presumption, subject to the constitutional limitations applicable to such presumptions. Since a presumption that dependency does not occur for nine months is by no means universally true—indeed, in at least the majority of instances would be untrue—such a presumption is constitutionally defective. See discussion, *infra*.

[5]In contradistinction to the situation of a widow, until recently dependency was an explicit eligibility requirement as to the *divorced ex-wife* of a deceased wage earner. Former U.S.C. §402(b)(1)(d), read, in pertinent part: "[A divorced wife is entitled to benefits, if she] . . . was receiving at least one-half of her support as determined in accordance with regulations prescribed by the Secretary [of HEW], from such individual, or was receiving substantial contributions from such individual (pursuant to a written agreement) or there was in effect a court order for substantial contributions to her support from such individual. . . ."

II.

A CONCLUSIVE PRESUMPTION THAT A MARRIAGE TERMINATED BY DEATH THROUGH ILLNESS WITHIN NINE MONTHS WAS A SHAM ENTERED INTO FOR THE PURPOSE OF FRAUDULENTLY OBTAINING SURVIVORSHIP BENEFITS IS UNCONSTITUTIONAL.

Numerous decisions of this Court have established that legislation which presumes evidentiary facts without possibility of rebuttal is unconstitutional if: (1) the presumed facts are not universally true; (2) reasonable alternative means exist for the determination of the actual facts; and (3) the statute is wholly evidentiary, serving no substantive policy purposes. *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) and cases there cited. *See also United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973) and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

A. The Nine Month Conclusive Presumption of Sham Marriage Contracted in Contemplation of Death is not Universally True.

SSA has studiously refrained even from suggesting that the marriages of which the Salfis and those similarly situated are survivors were sham or fraudulent. On the contrary, SSA has stipulated that the Salfi marriage was genuine in every respect, that medical examination had shown Mr. Salfi to be in perfect health

at the time of the marriage and that his death from heart failure some six months later was entirely unexpected.[6] SSA has not adduced any evidence as to the incidence of sham marriages concocted to obtain survivorship benefits nor has it referred to congressional hearings or findings which would show that the anticipated danger is more than merely speculative.

In contrast to this hypothetical danger of fraud, it is common knowledge that each year thousands of apparently perfectly healthy American men in their 50's, 40's, 30's and even 20's die suddenly and wholly unexpectedly of heart failure or other illnesses. It is apparent, therefore, that the nine-month conclusive presumption is not only *not* universally true, but is erroneous in the majority of cases. Indeed, in view of SSA's failure to attempt to establish any incidence whatever of sham marriages, it must be assumed that

[6]Attached to the Complaint below was an affidavit of Mrs. Salfi setting out in detail the facts as to her courtship and marriage to Mr. Salfi and his subsequent death. SSA stipulated below (see Appendix p. 29, paragraph 2) to the factual accuracy of that affidavit and of paragraph 11 of the Complaint, which reads, in pertinent part:

> "That Mr. Salfi's death from heart failure was entirely unexpected and unforseen; that Mr. Salfi was in sound health both at the time of the marriage and in the more than 12 months previous thereto during which they courted; that Mr. Salfi was an active and, to all appearances, perfectly healthy man of 52 years at the time of marriage; that routine medical examinations over the past several years showed Mr. Salfi to be in good health with an expectancy (actuarily determined) of another 21 years of life; that plaintiff [Mrs. Salfi] and Mr. Salfi were married not in contemplation of his death, but because of their mutual love and need for each other and with the expectation of living the remaining years of their lives together."

the haphazard operation of the nine-month conclusive presumption disallows hundreds (perhaps thousands) of genuine applications each year for every one fraudulent application.[7]

B. Reasonable Alternative Means are Easily Available to Determine Whether the Marriage was Actually a Sham Entered Into for the Purpose of Obtaining Survivorship Benefits After the Wage Earner's Expected Imminent Death.

SSA suggests that practical (and perhaps constitutional-privacy) considerations would make it impossible to determine whether a marriage was genuine or a sham. But this is by no means true as a long line of cases in the immigration area dealing with sham marriages illustrate.[8] Moreover, the problems of proof are immensely simplified because the objective is not to identify the intent behind genuine marriages, but rather

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[7]Since there are no reliable figures available, the Salfis have not attempted to delineate the precise number of persons affected by the nine-month conclusive presumption. In an affidavit from a Social Security employee, SSA estimates (on what basis it is not clear) that approximately 20,000 claims for survivorship benefits have been rejected in the six years in which the nine-month conclusive presumption has been in operation. *Affidavit of Russell F. Davis,* attached to SSA's Motion for Reconsideration, below.

[8]See Lutwak v. United States, *supra,* and the cases cited at note fn. 3, *supra.*

to exclude sham marriages entered into in contemplation of the wage earner's imminent death. Obviously, a marriage could only be contracted in that expectation if it were known that the wage earner was terminally ill. It must be assumed that in the majority of cases falling under the nine-month conclusive presumption, the wage earner was not known to be terminally ill at the time of marriage and the applicant for survivorship benefits must be allowed to demonstrate this. Such a demonstration could be made by affidavit (*e.g.* of the wage earner's physician) or documentary medical evidence, without even the necessity of a formal hearing procedure. Congress has implicitly recognized that determining the facts in this manner would not impose an inordinate administrative burden by enacting subsection (k) of §416 which requires SSA to determine whether "at the time of the marriage involved [a wage earner] could not have reasonably been expected to live for nine months.[9]

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[9]In a remarkable feat of advocacy, SSA turns the Salfi's argument upside down and accuses them of proposing a conclusive presumption that "any marriage which occurs less than nine months before a wage earner's [sic] *expected* death was motivated by desire to obtain benefits." Opening Brief, n.12, emphasis in original. The Salfis' argument does not suggest what inferences might be drawn as to genuineness of a marriage from the fact that it was entered into in expectation of death. The Salfis are, rather, concerned with the opposite situation and their argument consists of no more than the self-evident proposition that a marriage could not have been entered into as a short-term expedient in contemplation of the wage earner's imminent death if in fact he was not known to be terminally ill at the time of the marriage.

C. The Nine-Month Conclusive Presumption is Wholly Evidentiary and Does not Serve the Substantive Purpose of Deterring Sham Marriages Motivated by the Desire to Fraudulently Qualify for Survivorship Benefits.

SSA attempts to categorize the nine-month conclusive presumption as a *deterrent* to short-term sham marriages entered into to qualify for benefits rather than simply a way of detecting and dealing with such situations. The nine-month conclusive presumption imposes no penalty for attempting to obtain benefits through a sham marriage and its operation is so haphazard that it provides no deterrent whatsoever. Parties who might consider entering into a short-term sham marriage know that benefits will automatically be available if the terminally ill wage earner can hang on for nine months after the ceremony, whereas neither of them will lose anything if he does not. As SSA itself so neatly expresses it, even "a claimant who admits that the marriage was contracted to obtain benefits will receive benefits if the marriage has lasted more than nine months."[10]

III.

THE CONCLUSIVE PRESUMPTION DOCTRINE APPLIES TO THE SOCIAL SECURITY ACT JUST AS IT APPLIES TO ANY OTHER LEGISLATIVE ENACTMENT.

Citing neither reason nor authority, SSA contends that the principles established in this Court's conclusive

[10]Opening Brief, p. 10.

presumption decisions are in some very mysterious way inapplicable to the Social Security Act.[11] In fact, this Court applies the conclusive presumption doctrine to invalidate a provision of the Social Security Act just last term in *United States Department of Agriculture v. Murry*, 413 U.S. 508. SSA's attempt to distinguish *Murry* as involving an "arbitrary" conclusive presumption implicitly admits that the conclusive presumption doctrine is applicable to Social Security Act cases.[12] Moreover that characterization provides no distinction

[11]Opening Brief pp. 12-15. Much earlier in the brief, SSA cites Flemming v. Nestor, 363 U.S. 603, 611 and Richardson v. Belcher, 404 U.S. 78, 84 for the proposition that provisions of the Social Security Act are invalid "only" if they involve patently arbitrary classifications. Neither of these cases, however, involve conclusive presumptions and SSA does not appear to rely upon them as buttressing its argument that the Social Security Act is immune from the conclusive presumption doctrine.

SSA's only argument appears to be that application of the conclusive presumption doctrine might invalidate large portions of the Social Security Act. The short answer to this is that, as this Court has always recognized, a statute may be invalidated as a conclusive presumption only if it operates as an evidentiary presumption rather than a substantive rule of law. Virtually any statute could be invalidated by hypothesizing an evidentiary purpose for it and ignoring the fact that it actually represents a substantive policy decision. The Social Security Act is not unique in this respect. In the next section we shall argue that, properly applied, this Court's conclusive presumption decisions establish a salutory and quite limited rule of fundamental fairness which should be retained.

[12]See also Vlandis v. Kline, 412 U.S. 441, invalidating a statute limiting access to higher education, a privilege which has consistently been held not to represent a fundamental right. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 29-35, Hamilton v. Board of Regents, 293 U.S. 245.

whatever from the present case, since it is difficult to imagine a more arbitrary conclusive presumption than the one here involved.

IV.

THIS COURT SHOULD REAFFIRM IN THIS CASE THE DOCTRINE THAT CONCLUSIVE PRESUMPTIONS ARE UNCONSTITUTIONAL UNLESS UNIVERSALLY TRUE.

Although SSA does not call for the repudiation of this Court's conclusive presumption decisions, its suggestion that they render questionable many portions of the Social Security Act[13] is reminiscent of sharp criticisms contained in the dissents over which those decisions were rendered. Just last term, Mr. Justice Rehnquist characterized those decisions as enunciating a "still novel" doctrine which, if consistently applied, might invalidate "Congress' determination that Social Security benefits begin at a specified age", as well as minimum age requirements for voting, marriage or driving, and mandatory retirement ages for government

[13]After broadly stating that "almost every statutory entitlement provision [of the Social Security Act] can be recast as a 'conclusive presumption' ", SSA lists a number of statutes which it apparently considers prime candidates for extinguishment in that fashion. Opening Brief, p. 13 and notes 10 and 11. The list becomes somewhat less impressive when one finds that it includes three instances of the nine-month conclusive presumption, two of which are involved in this case and another being the analogous provision with regard to "widowers." SSA's other suggested statutes are largely duplicatory of the much more extensive list offered by Mr. Justice Rehnquist in several dissenting opinions which are discussed at length in the text accompanying note 15 *et seq.*

employees. *Jimenez v. Weinberger*, 417 U.S. 628, at 638 and 640; *LaFleur, supra*, 414 U.S. at 687.

Needless to say, the Salfis both urge the retention of the doctrine and deny the assertions of its critics that it threatens to eradicate the legislative power. Indeed the Salfis would even deny that there is anything "novel" about the doctrine since for almost 65 years this Court has recognized the fundamental unfairness of a conclusive presumption that something is true (when it is not true) which operates to preclude citizens from demonstrating the actual facts. *Mobile J. & K.C. Ry. v. Turnipseed*, 219 U.S. 35, 43 (1910) (dictum). *See also Schlesinger v. Wisconsin*, 270 U.S. 230 (1926) and *Heiner v. Donnan*, 285 U.S. 312 (1932) in which state and federal statutes were invalidated as unconstitutional conclusive presumptions. Nor is there any novelty in the objections now urged against the doctrine. From the earliest cases to the present, conclusive presumptions were defended as a convenient means of avoiding the administrative burden of individual fact finding. But this Court has invariably held that mere administrative convenience cannot justify legislation which arbitrarily presumes an individual into an inapplicable class and denies him the right to prove the individual facts which entitle him to a benefit or to exemption from a burden. As Mr. Justice White (speaking for the Court) said in *Stanley v. Illinois*:[14]

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. *But the constitution recognizes*

[14]405 U.S. 645, 656-657 (1972) (emphasis added; footnote omitted).

> *higher values than speed and efficiency*. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praise-worthy government officials no less, and perhaps more, than mediocre ones.
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> *Procedure by presumption is always cheaper and easier than individualized determination.* But when, as here, the procedure forecloses the determinative issues of competence and care, when it implicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

We readily agree with Mr. Justice Powell's caution that conclusive presumption claims should be approached "with extreme care."[15] As SSA has demonstrated virtually any statute can be mislabelled an unconstitutional irrebuttable presumption by ignoring the fact that it serves a substantive policy and hypothecating instead a mythical evidentiary purpose for it. Nevertheless, this Court's conclusive presumption doctrine (which SSA characterizes as a "constitutional

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[15] *LaFleur, supra,* 414 U.S. at 652. While indicating his concern that the conclusive presumption doctrine might be misused to encroach upon legitimate legislative enactment, Mr. Justice Powell explicitly noted his continued approval of *Vlandis* and the other cases cited *supra,* striking down enactments which, beyond peradventure, were conclusive presumptions of evidentiary fact not universally true.

straightjacket" upon the legislative process)[16] has existed for over six decades without noticeably impeding the legislative process on either federal or state levels. This long history of "peaceful coexistence" between the conclusive presumption doctrine and the legislative process is attributable to the fact that this Court has never applied the doctrine to legislation which creates a substantive rule of law, or indeed to any legislation which does not operate solely as an evidentiary presumption.[17]

In this respect it may be useful to consider SSA's suggestion that the Social Security Act's fixing of age 62 as the minimum age for receipt of old-age security (retirement) benefits, constitutes a conclusive presumption: "Since the purpose of retirement benefits is the replacement of earnings lost through retirement, the age 62 requirement could be viewed as a 'conclusive

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[16]Opening Brief, p.15, quoting Jefferson v. Hackney, 406 U.S. 535, 546–an equal protection case which did not involve any reference to the conclusive presumption doctrine.

[17]Despite the fears that a uniform application of the conclusive presumption doctrine would require a wholesale invalidation of innumerable unobjectionable statutes, it is rare to find a purely evidentiary statute which cannot convincingly be argued to additionally or alternatively serve some substantive policy. Obviously the fact that no substantive policy purpose can realistically be ascribed to a statute is indicative that it is a solely evidentiary conclusive presumption. Other strong indications that a statute is solely an evidentiary conclusive presumption would include: (a) the fact that the State, in defending it against constitutional attack, admits that it is a conclusive presumption and urges that it be validated upon that ground (Stanley v. Illinois, *supra.*); (b) the fact that, as in this case, legislative committee reports describe it as a conclusive presumption; (c) the fact that legislative debate explained it as a conclusive presumption (United States v. Murry, *supra.*) and/or (d) as in this case, the fact that the legislative scheme is patently evidentiary in character.

presumption' that no individual loses earnings through retirement before age 62."[18] It would be difficult to find a clearer example of a statute enacting a substantive rule of law and lacking any vestige of evidentiary operation. Fully cognizant that some people retire before the age-range customarily considered appropriate, Congress excluded them from benefits for the substantive purpose of discouraging such retirement or at least of not subsidizing such requirement with Social Security benefits.

Mr. Justice Rehnquist's suggestion that minimum or maximum age statutes for voting, driving, etc. may be invalidated under the conclusive presumption doctrine, ignores yet another fundamental limitation upon that doctrine: Even a purely evidentiary presumption may be made irrebuttable if it represents a discretionary legislative judgment as to facts so ultimate or abstract in their nature as not to be readily subject to ordinary methods of proof and therefore not demonstrable in a hearing context. We cannot do better than to quote language of Mr. Justice Holmes which this Court (speaking through Mr. Justice Douglas) quoted with approval just last term in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 n.5 (1974):

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it, the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the

[18]Opening Brief, n.11 at p.14.

other. But when it is seen that a line or a point there must be, *and that there is no mathematical or logical way of fixing it precisely*, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Louiville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41. (*Emphasis added.*)

With these limitations in mind, the constitutionality of minimum age requirements for voting or marriage or of mandatory retirement statutes, becomes clear. It is apparent, for instance that a minimum age statute for voting, even if taken as a purely evidentiary presumption that those below a certain age have not the intellectual capacity to vote, would not be subject to challenge as a conclusive presumption because it rests upon a factual judgment of a kind inherently impossible to test on an individual level. We may all agree that some 16-year olds are sufficiently well developed intellectually to vote while some 20-year olds are not. But reasonable men could and would reasonably disagree as to what evidence would demonstrate sufficient intellectual capacity, what the general standards of capacity were or even how to weigh the evidence. These kinds of questions are simply not subject to individualized fact-finding.

Moreover, to each of these age-based statutes may be attributed a substantive policy purpose in addition to, or instead of, the evidentiary ones already suggested. For instance, a mandatory retirement age statute may be seen as serving the substantive economic policy of ongoing redistribution of a finite number of public employment jobs, and the income therefrom, throughout the age spectrum in an economic system in which young adults are constantly entering the labor market. Similarly, an 18-year requirement for driving can be

seen as a means of reducing road traffic (and attendant dangers of accident and pollution) by excluding those for whom driving is least economically necessary.

Far from threatening to engulf myriad desirable legislative enactments, the conclusive presumption doctrine envisioned by this Court (as opposed to that envisioned by SSA) has a severely limited scope. If restricted to evidentiary presumptions–not including presumptions which are not susceptible to quantifiable proof–that doctrine will serve only the fundamental due process purposes for which it was designed.

V.

THE NINE MONTH CONCLUSIVE PRESUMPTION IS SO FANTASTICALLY OVER-BROAD AS TO DEPRIVE THE SALFIS AND THOSE SIMILARLY SITUATED OF EQUAL PROTECTION.

As a device for ferreting out sham marriages,[19] the nine-month conclusive presumption is largely hap-

[19]In addition to the sham marriage rationale, SSA suggests that the nine-month conclusive presumption may be justified as a means of limiting survivorship benefits to those marriages in which the widow and stepchildren have become economically dependent upon the wage earner. This alternative rationale is not additionally treated here since it has already been dealt with, *supra* (see Part I, B). To summarize that treatment, the nine-month conclusive presumption cannot be considered to be a test of dependency: (a) because if it were, the different treatment accorded where the wage earner's death is accidental would be inexplicable; (b) because such an indirect test of dependency in a stepchild would be redundant since direct proof

hazard—only slightly less random than an exclusion of left-handed applicants. The presumption is both substantially underinclusive and astoundingly overinclusive. It will not reach a substantial proportion of the (hypothetical) sham marriage applications, *i.e.*, all those in which the wage earner manages to eke out more than nine months of life after marriage. More important is its overbreadth since, for every hypothetical application based upon a sham marriage which it will exclude, it will also exclude hundreds (perhaps thousands) of applications based upon genuine marriages. To a statute like this the traditional deference to legislative experimentation and the legislature's right to cure only part of an evil is simply inapplicable. For the challenge here is based not so much upon Congress' failure to cover the entire field, as upon its excess in heedlessly excluding hosts of genuine applications in order to pretermit a few fraudulent ones.[20]

As the commentators have recognized, this Court has seen comparatively few such "overinclusion" cases, although these are far "more objectionable" than the familiar "underinclusive" cases in which maximum judicial deference to legislative classification is required.[21] Race, national origin, alienage and other such suspect classifications are almost always vastly overin-

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of dependency is required as a condition of their eligibility; (c) because it is the clear policy of the Social Security Act to provide survivorship benefits to a wife without any test of economic dependency; and (d) because a nine-month conclusive presumption is both unnecessary and conspicuously ineffective as a test of dependency.

[20]See Carrington v. Rash, 380 U.S. 89.

[21]"Developments In The Law—Equal Protection", 82 Harv. L. Rev. 1065, 1086-1087 (1969). In the germinal law review article

clusive because they are based upon an attempt to taint an entire class with an evil which in fact characterizes only some of its members. Even where such suspect classifications were not involved, this Court has almost

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discussing and categorizing under and overinclusive classifications, Tussman and TenBroek point out the much greater probability of unfairness in an overinclusive than an underinclusive classification: "[In an underinclusive classification] all who are included in the class are at least tainted by the mischief at which the law aims; while overinclusive classifications reach out to the innocent bystander, the hapless victim of circumstances or association." They go on to suggest that overinclusive classifications can be justified only by a state of public emergency in which there is not time for a more careful differentiation. "The Equal Protection of the Laws", 37 Cal. L. Rev. 341, 351-352.

SSA cites North American Company v. Securities and Exchange Commission, 327 U.S. 686, 710-11 (1946) for the proposition that "if evils disclose themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation." A reading of this language in context, however, discloses that it was not intended to validate overinclusive (or indeed any) classifications since the case did not involve any equal protection question. The legislation involved did not heedlessly sweep together a large group of innocent persons and a small one of malefactors, penalizing them all for the misconduct of the latter. Indeed the legislative scheme was not punitive but prophylactic and involved a classification exactly congruent with the legislative purpose which was to protect the national economy by imposing a single uniform regulatory scheme upon gas and electric holding companies. As the Court went on to say in the sentence immediately succeeding that quoted by SSA: "[The legislation in question] is not designed to punish past offenders, but to remove what Congress considers to be potential if not actual sources of evil. And nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality." 327 U.S. at 711.

invariably struck down classifications which it explicitly identified as overinclusive (or over and underinclusive). *See e.g. United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535-536 (1973):

> [It is argued in support of a statute barring members of "unrelated households" from food stamp eligibility that such households] are more likely than "fully related" households to abuse the program [and] that such households are "relatively unstable", thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the government's wholly unsubstantiated assumptions concerning the difference between "related" and "unrelated" households, we still cannot agree with the government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constituted a rational effort to deal with these concerns. [Emphasis in original.]

Accord: Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) (rejecting the justification that a requirement that incarcerated criminals, but not those who received a fine or suspended sentence, must repay local government for the cost of transcripts is a means of deterring frivolous appeals: "... the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous, and leaves untouched many whose appeals may have been frivolous indeed."); *Eisenstadt v. Baird*, 405 U.S. 438, 451 (1972) (considered as a health measure, a statute providing that contraceptives can be distributed only by those licensed to distribute them to married persons "would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married") (*see also* White & Blackmum, J.J. concurring specifically on these grounds alone, Id. at 463-465).

Jiminez v. Weinberger, 414 U.S. 1061 (1974) in which just last Term this Court invalidated another provision of the Social Security Act is precisely in point. The language in which the Chief Justice held the statute overbroad needs no gloss to demonstrate its applicability to the present case:

> We recognize that the prevention of spurious claims is a legitimate governmental interest and that, dependency of illegitimates in appellants' subclass as defined under the federal statute, has not been legally established even though, as here, paternity has been acknowledged. As we have noted, the Secretary maintains that the possibility that evidence of parentage or support may be fabricated is greater when the child is not born until after the wage earner has become entitled to benefits. It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, *it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency* and their right to insurance benefits, and it would discriminate between the two subclasses of after-born illegitimate without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses.
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> *The Secretary does not contend that it is necessarily or universally true that all illegitimates in appellants' subclass would be unable to establish their dependency and eligibility under the Act if the statute gave them an opportunity to do so.* Nor does he suggest a basis for assumption that all illegitimates who are statutorily deemed entitled to benefits under the Act are in fact dependent upon

their disabled parent. Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent. Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, *the Act's definition of these two subclasses of illegitimates is "over-inclusive"* in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "under-inclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence *to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the due process provision of the Fifth Amendment. Schneider v. Rusk,* 377 U.S. 163, 168; *Bolling v. Sharpe,* 347 U.S. 497, 499. [Emphasis added.]

ARGUMENT [SOVEREIGN IMMUNITY]

SSA having raised the soverign immunity defense, the Salfis must discuss this regrettable and confusing doctrine in its various permutations and at excrutiating length. But before so embarking, it is appropriate to note that what SSA really relies upon is not sovereign immunity but a frivolous claim that administrative remedies have not been exhausted. SSA concedes (and it is otherwise clear) that Congress has waived sovereign

immunity to suits for Social Security benefits by enacting 42 U.S.C. 405(g). The Salfis did not explicitly invoke that statute[22] below because, on its face, it appears to require the exhaustion of an administrative remedy which could not resolve their purely constitutional claims. While the action was pending below, however, another member of the class submitted the Salfis' pleadings in an SSA administrative appeal in order to raise the constitutional question. SSA refused to hear that appeal, holding that it lacked jurisdiction to decide constitutional claims and that these could be resolved only in the judicial forum.[23] That decision, having been affirmed by HEW on March 27, 1974,[23] is entitled to "great deference" by this Court. *Johnson v. Robison*, 415 U.S. 361, 367-368 (1974) (deferring to holding by the Board of Veteran's Appeal that it had

[22]The jurisdictional statutes expressly relied upon in the Complaint were 28 U.S.C. 1331 (federal question), 1343 (civil rights), 1361, 2201 and 2202 (declaratory judgment) and the Administrative Procedure Act. Of course, under the Federal Rules of Civil Procedure and the general principles of modern jurisprudence, the Salfis were not required to name any jurisdictional basis whatever, and were entitled to relief under any statute relevant to the issue set out in the Complaint. Wilwording v. Swenson, 404 U.S. 249 (1971), Scheuer v. Rhodes, 416 U.S. 232, 236 (1973). Nor does the fact that the judgment below does not specifically rest upon §405(g) preclude this Court from affirming it as authorized thereby. See e.g. Brown v. Allen, 344 U.S. 443, 459 (" 'In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.' ")

[23]The administrative law judge's decision "In the Case of Lillian Daniels" issued November 14, 1973, was introduced by the Salfis below and is quoted in pertinent part at p. 21 of the Salfi's Motion to Affirm in this Court.

no jurisdiction to decide constitutional questions.)[24] The essential frivolity of SSA's sovereign immunity claim is evident from its failure to claim immunity in a procedurally identical case now pending in this Court. *Weinberger v. Wiesenfeld*, No. 73-1892. In that case, individual retroactive Social Security benefits were awarded upon the invalidation of a Social Security statute, the plaintiff having proceeded under 28 U.S.C. §1331 and 42 U.S.C. §405(g) without ever having presented his constitutional claims to the administrative tribunal.[25] SSA accepts the rectitude of that procedure on appeal—and in the District Court it stipulated that exhaustion of the administrative remedy would have been futile since the administrative tribunal had no jurisdiction to decide constitutional questions.[26]

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[24] In any event, it is evident that SSA's policy is to refuse to hear constitutional questions regardless of whether §405(g) should be interpreted to allow it to decide them. It would seem to follow that SSA would be estopped from raising failure to exhaust administrative remedies as to constitutional claims as a bar to §405(g) jurisdiction.

[25] The failure to raise the sovereign immunity claim in the Wiesenfeld case might seem explicable on the practical grounds that only individual retroactive benefits were awarded in that case. However if SSA were motivated by practical considerations, it would never have raised sovereign immunity in this case since even a favorable decision from this Court on that ground will not save it a penny. Rather, such a decision would simply result in the institution by some member of the Salfi class who has exhausted the administrative remedy of a §405(g) action as to which sovereign immunity will be no defense.

[26] See Wiesenfeld v. Secretary of Health, Education & Welfare, 367 F.Supp. 981, 985 (D. N.J. 1973). The District Court held there (as did the court below in the present case) that where purely constitutional claims were presented it enjoyed jurisdiction under 28 U.S.C. §1331 and did not, therefore, determine whether additional alternative jurisdiction existed under 42 U.S.C. §405(g).

I.

BY ENACTING 42 U.S.C. §405(g), CONGRESS HAS CONSENTED TO SUITS FOR SOCIAL SECURITY BENEFITS UNDER THAT SECTION AND/OR OTHER SOURCES OF JURISDICTION WITHOUT EXHAUSTION OF THE ADMINISTRATIVE REMEDY WHEN THIS IS REFUSED BY SSA.

It is clear that an administrative appeal of the Salfis' constitutional claims would have been a waste of time both for them and for the administrative agency. Recognizing this, a three-judge district court has recently held that a §405(g) may be maintained without exhaustion of administrative remedies where the only question at issue is the constitutionality of a federal statute. *Diaz v. Weinberger*, 361 F.Supp. 1, 4-5 (S.D. Fla. 1973). Other courts, including the one below, have adopted the alternative hypothesis that the suit may be maintained without exhausting administrative remedies under 28 U.S.C. 1331 (or other jurisdictional statutes). *Wiesenfeld v. Secretary of Health, Education & Welfare*, 367 F.Supp. 981, 985 (D. N.J. 1973), *Williams v. Richardson*, 347 F.Supp. 544 (W.D. N.C. 1972), *Gainville v. Richardson*, 319 F.Supp. 16 (D. Mass. 1970), *Rhodes v. Weinberger*, C.A. No. 74-1511 (E.D. Penn.)[27] and cases there cited.[28]

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[27]See Memorandum and Order of January 25, 1975 attached as an Appendix to this brief.

[28]There is also one contrary case which is described in the following language of fn. 2 of Rhodes v. Weinberger: "The exception is Bartley v. Finch, 311 F.Supp. 876 (E.D. Ky. 1970) where a three-judge court ruled that it lacked jurisdiction because

Although this Court has yet to construe §405(g) or its relationship with other sources of federal jurisdiction in this respect, just last Term it held that an even more sweeping limitation on judicial review—committing all decisions on Veteran's benefit claims to the *unreviewable* discretion of the Veteran's Administration—was not intended to foreclose constitutional challenges to the statutory scheme which the Veterans' Administration had no jurisdiction to hear. *Johnson v. Robison*, 415 U.S. 361 (1974). It would be inconsistent with that decision, with the generally understood purposes of the exhaustion requirement, and with common sense to interpret §405(g) as requiring that plaintiffs situated as were the Salfis must go through a useless administrative appeal before they can file a lawsuit and obtain a decision. Innumerable opinions of this Court over the past century have recognized that the exhaustion requirement exists for the intensely practical purposes of affording the government agency involved an opportunity to review and correct factual errors or misinterpretations of law and giving the parties and the courts the benefit of the agency's experience and expertise in the subject matter. *See e.g. McKart v. United States*, 395 U.S. 185 (1969), *Parisi v. Davidson*, 405 U.S. 34 (1972) and cases there cited. This salutory principle of law is therefore inapplicable to constitutional claims which administrative agencies have no power to adjudicate. *Johnson v. Robison, McKart v.*

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plaintiffs failed to exhaust their administrative remedies [under §405(g)]. The Court then went on to decide against plaintiffs on the merits. On appeal, the Supreme Court affirmed on the merits, 404 U.S. 980 (1971), thus implicitly deciding that jurisdiction was proper."

United States, Parisi v. Davidson, supra. See also Oestereich v. Selective Service Board, 393 U.S. 233, 242 (1969). It cannot be doubted that Congress was fully cognizant of these principles–and of the common sense reasoning upon which they are based–when it waived sovereign immunity by enacting §405(g). It follows either that §405(g) actions can be brought without regard to exhaustion of an unavailable administrative remedy, or that the section's waiver of sovereign immunity must be deemed to extend to suits to establish the right to Social Security benefits brought under other sources of federal jurisdiction.

This result is suggested at once by one of the earliest and one of the latest sovereign immunity cases decided by this Court. *Kendall v. United States*, 37 U.S. (12 Pet.) 522 (1838) and *Honda v. Clark*, 386 U.S. 487 (1967). In *Kendall* a statute authorizing the Solicitor of the Treasury to settle certain claims was held implicit consent for a suit to require the Postmaster General to honor the settlement–a suit in which "the real parties to the dispute were, therefore, the [claimants] and the United States." 12 Pet. at 611. in *Honda*, the Court expanded a waiver of sovereign immunity as to suits brought against the Alien Property Custodian by holding that a very abbreviated statute of limitations was tolled according to traditional equitable principles which it implicitly embraced. The factors relied upon by the Court were similar to those relied upon here: (a) the injustice of a contrary holding in depriving litigants of their proper claims; (b) the clarity of Congress' general purpose of dispensing with immunity in order to allow litigation of contested claims; (c) the evident purpose of the limitation construed being to enhance

administrative efficiency "and not primarily as a shield for the Government";[29] and (d) the existence of a traditional equitable principle of which Congress was doubtless aware in enacting the specific limitation involved.

Nor is there anything revolutionary about suggesting that a waiver of sovereign immunity under a statute limited in subject matter is applicable to a claim limited to the same relief brought under general jurisdictional statutes like 28 U.S.C. §§1331, 1361 and the Administrative Procedure Act. Where the alternative is unnecessary delay or duplication of litigation this Court has recognized extraordinary remedies without regard to over-technical jurisdictional quibbling. This is the rationale under which this Court created the doctrine of "pendent jurisdiction" whereby federal courts may entertain state claims of which they would not otherwise have jurisdiction if these are factually identical to federal claims of which they do have jurisdiction. *Hurn v. Oursler*, 289 U.S. 238 (1933) and *United Mine Workers v. Gibbs*, 383 U.S. 822 (1966) were creative responses to a situation in which the existence of identical, but jurisdictionally inconsistent, federal and state claims had formerly led to duplicative litigation. Similarly, just last term, this Court found such considerations dispositive in clarifying the authority of federal courts to entertain federal statutory causes of action (of which their jurisdiction is dubious) as pendent to federal constitutional causes of action. *Hagans v. Lavine*, 415 U.S. 528 (1974), and cases there cited.

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[29]386 U.S. at 496.

II.

SOVEREIGN IMMUNITY DOES NOT BAR A JUDGMENT WHICH MERELY REQUIRES FEDERAL OFFICERS AND AGENCIES TO CEASE VIOLATING THE CONSTITUTION AND TO CORRECT THE EFFECT OF PAST VIOLATION.

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 690 n.10 (1949) and cases there cited. Conceding this general principle, SSA nevertheless argues that the judgment below violates sovereign immunity because it orders that all those unconstitutionally denied benefits be notified of their opportunity to reapply and, if now found otherwise eligible, be paid the past due benefits.[30] *Larson's* Footnote 11, suggesting that, even in a constitutional case, sovereign immunity "may" bar awards "of unquestionably sovereign property" can be seen as validating SSA's position. But the ambiguity of Footnote 11's language (which has not further been clarified by this Court) lends support to several possible interpretations. The Ninth Circuit (and consequently the court below) follows Professor Jaffe's view that Footnote 11 bars only relief which is so sweeping as to empty the Treasury or otherwise gravely impede the operation of

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[30]SSA's objection goes only to the retroactive benefit aspect of the notification requirement. SSA apparently now concedes (Opening Brief "Questions Presented" (p.2) and pp. 21-22). The propriety of requiring it to notify those previously denied benefits so that they may reapply in order to become eligible for *future* benefits.

the federal government.[31] Alternatively, there is some question whether the language of Footnote 11 has any application at all to monetary awards like that here involved. The "unquestionably sovereign property" involved in *Larson*, its progeny and its progenitors was not money from the federal treasury, but realty (or occasionally "personalty"—if an item like a cruiser can be so denominated), the ownership or possession of which was in dispute. Other language in *Larson* (337 U.S. at 703-704) tends both to restrict the breadth of Footnote 11 and to generally support the judgment below:

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. . . . But the reasoning is not applicable to suits for specific relief. For it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. *The Government, representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents*

[31] Jaffe, Judicial Control of Administrative Action, 226-227; Jaffe, "Suits Against Governments and Officers: Sovereign Immunity", 77 Harv. L. Rev. 1, 34 (1963). State of Washington v. Udall, 417 F.2d 1310, 1318 (9 Cir. 1969), Turner v. Kings River Conservation District, 360 F.2d 184, 190 (9 Cir. 1966). But see Littell v. Morton, 445 F.2d 1207, 1212-1214 (4 Cir. 1971).

> *a disputed question of property or contract right . . .*
>
> There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs *the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.* [Emphasis added.]

Although retroactive benefits are a form of equitable relief, as SSA reminds us this Court has recently held that such an award is "in practical fact, indistinguishable in many aspects from an award of damages against the State." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

Whatever may be the proper interpretation of *Larson*, sovereign immunity has never been viewed by this Court as barring awards like the judgment below.[32] Thus, this Court has recently affirmed an award identical to that involved here—an award of class

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[32] *Cf.* Miguel v. McCarl, 291 U.S. 442, 455 (1934) (mandating payment of retirement or pension benefits illegally withheld), State of Ohio v. Helvering, 292 U.S. 360 (1934) (entertaining, although deciding adversely, state suit to enjoin collection of taxes by the United States—Kansas v. United States, 204 U.S. 33, holds that federal sovereign immunity applies to suits by states), Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936) (enjoining collection of unconstitutional federal taxes). *See also* Roberts v. United States ex rel Valentine, 176 U.S. 221 (1900).

retroactive benefits upon a finding that a provision of the Social Security Act was unconstitutional. *Griffin v. Richardson*, 346 F.Supp. 1226, aff'd 409 U.S. 1969 (1972). See *also Morton v. Ruiz*, 415 U.S. 199 (1974) (upholding class action to mandate reexamination of applications for federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation), *Department of Agriculture v. Murry*, 413 U.S. 508 (1973) (declaring unconstitutional statutory restriction on food stamp eligibility and mandating payment of benefits to class) and *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (same).

SSA seeks to buttress its sovereign immunity argument with *Edelman v. Jordan, supra*. But that case concerned *state* sovereign immunity which involves far different considerations than federal sovereign immunity and, because it is enshrined in the 11th Amendment, is a far more difficult jurisdictional obstacle. The central purpose of the 11th Amendment's restriction on the federal judiciary—outraged federalism—is simply irrelevant to a case like the present involving the assertion of federal jurisdiction over *federal* officials and agencies.[33]

[33]On the contrary, as this Court has stated (adopting the language of a lower court): " 'We yet like to believe that whereever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.' " McNeese v. Board of Education, 373 U.S. 668, 674, n.6 (1963). That reasoning is even more imperative where, as here, the absence of any alternative state jurisdiction means that denial of federal jurisdiction will preclude any judicial protection whatever for the Salfi family's constitutional rights.

The 11th Amendment represents a state "constitutional right" which this Court cannot abrogate, circumscribe, or limit. *Edelman, supra.*, 415 U.S. at 673. In contra-distinction, federal sovereign immunity is a policy created by the federal judiciary alone which this Court may abandon or restrict as it sees fit in view of such advances in jurisprudential thought as may have occurred since the 11th Amendment was enacted in the 18th Century.[34] Among those advances has been the utter discreditation of the doctrine of sovereign immunity.[35] As Mr. Justice Frankfurter said for this Court in *National City Bank v. Republic of China*, 348 U.S. 356, 359 (1955):

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[34]Block, "Suits Against Government Officers," 59 Harv. L. Rev. 1060, 1081 (1946) "[Confining sovereign immunity to cases] where no substantial claim is made that the officer is acting pursuant to an unconstitutional enactment, or in excess of his statutory authority . . . can be accomplished by the courts without the necessity of legislative action. In suits against government officers, the courts have always decided for themselves the question of how and to what extent the doctrine should be applied." The author distinguishes the issue of state government liability which has already been determined by the 11th Amendment.

[35]Professor Davis notes that "Nearly every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go." 3 Administrative Law Treatise, 435, while Professor Crampton flatly states that "no scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years." "Non-Statutory Review of Federal Administrative Action", 68 Mich. L. Rev. 387, 419 (1970). An extensive sampling of comments indicating scholarly execration of the doctrine of sovereign immunity appears at pp. 15-18 of the Salfis' Motion to Affirm and/or Dismiss filed in this Court.

> "[T]he immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."

So far as we can determine, the argument that *Edelman* should be interpreted to bar retroactive benefit judgments against the *federal* government has been presented to only two courts and both have rejected it.[36] It may also be significant that just five weeks before *Edelman* came down, this Court upheld in *Morton v. Ruiz, supra*, a class action for retroactive and prospective federal Indian welfare benefits.

III.

SOVEREIGN IMMUNITY IS INAPPLICABLE INSOFAR AS THE JUDGMENT BELOW ONLY EFFECTUATES SSA's OWN REGULATION REQUIRING THE PAYMENT OF RETROACTIVE BENEFITS.

An SSA regulation provides that persons who are later determined to have erroneously been denied benefits are entitled not only to prospective benefits, but to the benefits denied up to four years in the

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[36]The court below implicitly rejected it by refusing to reconsider and rehear the case when the Edelman issue was fully briefed after judgment. The Edelman argument was explicitly rejected in Rhodes v. Weinberger, *supra*.

past.[37] Certainly the decree below cannot be barred by sovereign immunity insofar as it simply requires SSA to accord the Salfi class the same treatment which would be accorded to any other Social Security applicant who had erroneously been denied benefits.

IV.

SOVEREIGN IMMUNITY IS NOT A DEFENSE TO LITIGATION UNDER THE OTHER SOURCES OF JURISDICTION RELIED UPON BY THE SALFIS.

Although the District Court did not rule on them, plaintiffs set out four jurisdictional bases besides 28 U.S.C. §1331. These were: (a) the Administrative Procedure Act; (b) 28 U.S.C. §1361 (mandatory relief against federal officers); (c) 42 U.S.C. §1985(2) (civil rights conspiracy statute) and its jurisdictional counterpart, 28 U.S.C. §1343(1); (d) a cause of action springing from the Fifth Amendment itself without

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[37] 20 C.F.R. §404.957 reads, in pertinent part:

"An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final under §404.908, §404.916, §404.951 may be reopened:

(a) Within 12 months from the date of the notice of the initial determination (see §404.907), to the party to such determination, or

(b) After such 12-month period, but within 4 years after the date of the notice of the initial determination, upon a finding of good cause for reopening such determination or decision. . . ."

necessity of Congressional authorization as per *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, (1971) and cases there cited.

While there are as yet no decisions on the point, appellees would contend that sovereign immunity is not a bar to the bringing of a case like the present under §1985 or under the *Bivens* constitutional cause of action.[38]

The Administrative Procedure Act authorizes such broad review of administrative action that it has frequently been held to constitute a waiver of sovereign immunity. *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 668-669 (2 Cir. 1973) (sovereign immunity does not bar suit to require HEW to correct admittedly inadequate reimbursement for Medi-Cal services performed by contracting agency), *Constructores Civiles de Centro-America v. Hannah*, 459 F.2d 1183, 1191 (D.C. Cir. 1972) (sovereign immunity does not bar suit for "mandatory injunction and

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[38]Since Bivens involved federal officers and a constitutional provision directed to the federal government, it is clear that Bivens-type litigation may be brought against federal officers. Since § 1985, unlike its companion, 42 U.S.C. 1983, does not contain the limiting words, "color of *state* law," it is equally applicable to federal officers. City of Kenosha v. Bruce, 412 U.S. 507 (1973), holds (by implication) that §1985 as well as §1983 actions may not be maintained against *state agencies*. But the basis of this holding is the debate on the "Sherman Admendment" which showed Congressional dubiety as to whether federal courts could entertain suits against state agencies. Obviously, Congress could have entertained no doubt that it could authorize federal courts to entertain causes of action against federal officers or agencies.

declaratory judgment" to require A.I.D. to consent to the letting of a contract to the plaintiff company), *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 873-874 (D.C. Cir. 1970) (sovereign immunity does not bar action for declaratory relief of plaintiff's right to contract award where, allegedly, another bidder was improperly accepted), *Klatscha v. Driver*, 411 F.2d 436, 445 (2 Cir. 1969) (sovereign immunity does not bar suit by government employee for injunctive and declaratory relief from allegedly illegal disciplinary transfer), *Mulry v. Driver*, 366 F.2d 544, 547 (9 Cir. 1966) (sovereign immunity does not bar suit by government employees to invalidate regulation which prevents them from engaging in after-hours employment), *Estrada v. Ahrens*, 296 F.2d 690, 698 (5 Cir. 1961) (sovereign immunity does not bar action by alien to require his admission into the United States). *Per contra: Littell v. Morton*, 445 F.2d 1207, 1212-1214 (4 Cir. 1971) and cases there cited.

Congress enacted 28 U.S.C. §1361 for the precise purpose of providing a mandamus-type cause of action against federal officers. In doing so, it implicitly consented to litigation like the present. This is particularly true since Congress must have been aware of the numerous decisions by this Court holding sovereign immunity no bar to mandamus-actions to force federal officers to pay pension, retirement and/or other benefits comparable to Social Security. *See e.g., Miguel v. McCarl*, 291 U.S. 442, 455. *See also Roberts v. United States ex rel Valentine*, 176 U.S. 221 (1900). Just last Term this Court held in a case brought under §1361 that a class (which it redefined) could maintain an action to mandate re-examination of applications for

federal Indian welfare benefits which had previously been denied due to an invalid administrative regulation. *Morton v. Ruiz*, 415 U.S. 199 (1974). (The judgment must rest either upon the view that sovereign immunity was waived by §1361, or that it was never involved because the officers sued were acting in excess of their authority–see Part II of this section, *supra*.)

V.

A DECREE DOES NOT OPERATE AGAINST THE TREASURY WITHIN THE MEANING OF LARSON FOOTNOTE 11 WHERE THE FUNDS NECESSARY FOR ITS IMPLEMENTATION HAVE ALREADY BEEN APPROPRIATED BY CONGRESS AND ONLY THE ENJOINED UNCONSTITUTIONAL OFFICIAL ACTION PREVENTS THEIR DISBURSAL.

It has been held that *Larson* Footnote 11 is inapplicable where the fund which is subject to the suit has already been appropriated by Congress for the purpose of being so disbursed. *Commonwealth of Pennsylvania v. Lynn*, 362 F.Supp. 1363, 1368-1369 (D. D.C. 1973), *Local 2677, AFGE v. Phillips*, 358 F.Supp. 60, 68-69 (D. D.C. 1973). *See e.g., State Highway Commission v. Volpe*, 479 F.2d 1099, 1123 (8 Cir. 1973) ("notwithstanding, we do not consider the court's decree in the instant case as being affirmative in nature [within the prohibition of the *Larson* footnote]. It requires only that the defendant officers cease unauthorized action. *Cf. Rockbridge v. Lincoln*, 449 F.2d 567, 573 (9 Cir. 1971). The resultant release of

funds is only to the extent that Congress has already authorized them to be appropriated and expended.")

Similarly, the judgment below cannot be said to operate against the Treasury because Social Security benefits are paid from a Trust Fund derived from contributions of employers and wage earners rather than a regular appropriation of Treasury funds. And the decree does not mandate the payment of benefits but only re-examination of eligibility without application of the invalidated conclusive presumption.

ARGUMENT [APPROPRIATENESS OF RETROSPECTIVE APPLICATION]

SSA relies upon *Chevron Oil Co. v. Huson*, 404 U.S. 97 which holds that extraordinary circumstances may justify departure from the normal expectation that judicial decisions will apply retrospectively as well as prospectively. *Chevron* holds that retrospective application can be denied where: (a) a party has detrimentally relied upon a legal rule which a court (unforseeably) overrules or eliminates; (b) retrospective operation will not further the salutory operation of the new rule; and (c) retrospective application would "produce substantial inequitable results." 404 U.S. at 106-107. SSA attempts to satisfy the first of these criteria by characterizing the application of the conclusive presumption doctrine to a Social Security case as "a radical departure" from previous law.[39]

It should be sufficient to reiterate that the conclusive presumption doctrine has been a recognized part of

[39]Opening Brief, p. 20.

Due Process for almost 65 years. Indeed this Court had held a federal statutory conclusive presumption repugnant to the Fifth Amendment several years before the original passage of the Social Security Act, which itself predated by several years the enactment of the predecessor to the present nine-month conclusive presumption. *See Heiner v. Donnan, supra*, (1932). Surely neither Congress nor SSA during the almost 40 years of the Social Security Act's existence, have labored under the misconception that the Act was free from the guarantees of the Fifth Amendment. And if they had so misconceived the law, they would have been enlightened by *Flemming v. Nestor, supra* in which this Court scrutinized the Act under the Fifth Amendment, and *Department of Agriculture v. Murry, supra.* in which this Court invalidated one of its provisions as an unconstitutional conclusive presumption. Moreover, SSA has yet to suggest any way in which it changed position or detrimentally relied upon any belief that the conclusive presumption doctrine does not apply to the Social Security Act.

Secondly, SSA asserts that the giving of retroactive benefits is somehow inconsistent with the Social Security benefit scheme, citing only a *welfare* case, *Rothstein v. Wyman*, 467 F.2d 226 (2 Cir. 1972). The Salfis would inquire why, if retroactive benefit payments are inconsistent with the Act, SSA's own regulations specifically provide for them when an erroneous benefit denial is discovered?[40] *Rothstein's* holding provides no answer to this question, for it rests upon the unique features of the welfare benefit

[40]Cf. 20 C.F.R. 404.957 quoted at n.37, *supra*.

system—a system based upon a need standard under which eligibility is continuously retested. Retroactivity would be inappropriate, *Rothstein* reasons, since many members of the class might presently no longer be eligible for welfare and, since in any event, the needs which the benefits were originally intended to meet are past.[41] Unlike welfare, Social Security survivorship benefits are not based upon need, but upon statutorily specified eligibility criteria which, once established, continue without reference to change of economic circumstances as measured by a need, or any other test.[42] Since eligibility for survivorship benefits never

[41]Rothstein's holding in this respect does not meet with universal acceptance. Compare Jordan v. Weaver, 472 F.2d 985 (7 Cir. 1973) rev'd on other grounds, Edelman v. Jordan, *supra*. See also: Thompson v. Shapiro, 270 F.Supp. 331, 338, aff'd 394 U.S. 618; Gaddis v. Wyman, 304 F.Supp. 717, aff'd. 397 U.S. 49; Grubb v. Sterrett, 315 F.Supp. 990 aff'd. 400 U.S. 922; Rodriquez v. Swank, 318 F.Supp. 289 aff'd. 403 U.S. 901; Doe v. Swank, 332 F.Supp. 61 aff'd. 404 U.S. 987; Zarate v. State Department of Health & Rehabilitation Services, 347 F.Supp. 1004 aff'd. 407 U.S. 918; Gilliard v. Craig, 331 F.Supp. 587, aff'd. 409 U.S. 807.

[42]An applicant is eligible for welfare if he or she meets certain defined criteria (*e.g.* having a dependent child, being blind or disabled) *and* qualifies under the "means test", *i.e.*, not having earnings or property which exceed certain specified minimal amounts. Eligibility ends as soon as the recipient acquires sufficient property by inheritance or gifts or a sufficient salary.

In contra-distinction, a person becomes and remains eligible for survivorship benefits without regard to what property he or she has or may subsequently acquire. Benefits continue, without regard to any means test, until some specified statutory cut-off point (*e.g.*, in the case of children or stepchildren, age 18). Survivorship benefits can, it is true, be reduced to the extent of earnings from employment (42 U.S.C. 403(b), but this is simply

turned upon need, the question of whether various members of the class may have become more or less needy subsequent to the time when the retroactive benefits were due them simply never arises. Application of the welfare analogy in the Social Security area makes no more sense than suggesting that personal injury awards should not compensate for pain and suffering since by the time the case is filed the tort victim's pain and suffering is all over and done with anyway.

Finally, the award of class retroactive damages would not be inequitable to present Social Security recipients. Far from decreasing the funds available to them, it would simply enlarge the number of recipients, thereby requiring an enlargement of the congressional appropriation for the Trust Fund. This is something which occurs regularly whenever, as often happens, the number of recipients exceeds that which SSA estimated in formulating the preceding Congressional appropriation to the Trust Fund. (Indeed, if this "inequity" objection were serious, it would equally foreclose prospective benefits for the class since they were not considered by SSA and Congress in formulating the latest estimate of the number of beneficiaries for whom the present appropriation must provide.)

This case does represent a serious "inequity" of course. That inequity is that fact that a large class of persons entitled to Social Security benefits have for a number of years been unconstitutionally excluded therefrom. Unfortunately, it is this very inequity which SSA seeks to continue.

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designed to reduce the competition of old age and survivorship beneficiaries in the employment market. Benefits are not reduced regardless of how much the applicant may receive from non-salaried earnings—bonds, stocks, corporate profits, etc.

ARGUMENT [CLASS ACTION ISSUES]

Apparently all that SSA seeks by way of appellate relief is some general advice to the court below on its class action procedures. Earlier SSA had questioned that court's certification procedure and vigorously objected to a post-judgment notification requirement which SSA misconstrued as requiring it to provide the kind of *prejudgment* notice to class members which *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974) requires plaintiffs to provide.[43] Although continuing to allege (harmless) error in the certification procedure, SSA

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[43]Far from ordering SSA to provide Eisen-type prejudgment notice, the court below never required notice to the class at all since this was an action under Rule 23(b)(2) in which prejudgment notice is not required, rather than one under Rule 23(b)(3) which would be governed by Eisen. The judgment required that defendants inform the approximately 20,000 applicants who have been excluded by the nine-month conclusive presumption over the past six years (see note 7, *supra*) that they are free to seek a reevaluation of their eligibility for retroactive and/or future benefits. Of course, without such notification, those people would presumably never know that their original rejection was wrongful and would therefore never reapply for a redetermination of their eligibility. Such notification is regularly required of defendants in equitable decrees where necessary to correct the effects of their previous wrongful or erroneous acts toward the class. *See e.g.*, Reed v. Arlington Hotel Company, Inc., 476 F.2d 721, 725 (8 Cir. 1973) (notification required of correction of previously discriminatory hiring policies), United States v. Jefferson County Board of Education, 380 F.2d 385, 391 (5 Cir. 1967) (notification of desistance from previous segregated school policy required to every Black family), Stell v. Savannah-Chattham Board of Education, 333 F.2d 55, 65 (5 Cir. 1964) (same).

apparently now admits that the class judgment below "will be binding on both the Secretary and all claimants"[44] and accepts its duty to notify all claimants who have already been denied under the nine-month conclusive presumption that they may seek prospective benefits by reapplying. (SSA reiterates its objection to class *retroactive* benefits, but this appears to rest upon the sovereign immunity issues heretofore explored rather than upon any question of class action law.)

Since SSA's former class action objections are fully treated in the Salfi's Motion to Affirm and/or Dismiss heretofore filed with this Court, and since SSA seems to no longer press these objections,[45] it will be unnecessary to discuss them at any length. Suffice it to say that any objections which SSA might have had to the class action procedure below were waived when it: (a) stipulated that the trial and all pre-trial proceedings and motions be combined in one hearing; (b) stipulated, without demur, to the class action allegations of the

[44] Appellants' Opening Brief, p.22.

[45] In comparing the "Questions Presented" in SSA's jurisdictional statement with the "Questions Presented" in its Opening Brief, it will be found that the class action question raised has been limited to the propriety of an award of retroactive damages.

Complaint;[46] (c) not only failed to seek a separate or prior certification hearing, but also failed in either written or oral argument to raise any issue of class action procedure; and (d) failed to raise any class action issue thereafter until final judgment had been rendered against it on a class basis, rather than in its favor as it had apparently assumed.

For the foregoing reasons, appellees urge that the judgment below be affirmed.

DATED:

Respectfully submitted,

DON B. KATES, JR.
BRUCE N. BERWALD
PETER H. REID
CARL L. McCONNELL
Legal Aid Society of San Mateo

JOHN GANT
ALBERT H. MEYERHOFF
DIANE S. GREENBERG
California Rural Legal Assistance

By/s/ Don B. Kates, Jr.

Attorneys for Appellees

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[46]SSA denies that it ever stipulated to the allegations of the Complaint, quoting the first half of the stipulation, Opening Brief, p.22. The full stipulation (with the omitted portion in italics) reads:

> 2. There are no genuine issues of material fact in dispute concerning the adjudication of the constitutionality of the challenged provision of 42 U.S.C. §416, *and that this three-judge panel may finally determine the constitutionality of said challenged provisions on the basis of the facts set out in the complaint and affidavits heretofore filed;*
>
> (App. 29, ¶2).

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER M. RHODES suing by her next of friend ELLANORIA RHODES,	:	CIVIL ACTION
and	:	
CLARA and BERNICE BROGDON, suing by their next of friend PEARL BROGDON	:	
v.	:	SENT BY JOHN J. HARDING CLERK, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF PENNSYLVANIA AT PHILADELPHIA 19107
CASPAR WEINBERGER, Secretary of Health, Education and Welfare	:	
	:	NO. 74-1511

MEMORANDUM AND ORDER

Newcomer, J. January 21, 1975.

This is one of those fortunately rare cases in which defendant's concession of liability creates more problems than it solves. Plaintiffs Jennifer Rhodes and Clara and Bernice Brogdon are illegitimate minors whom defendant denied child's insurance benefits solely because their natural father had not acknowledged them

or no finding of paternity had been made one year prior to their father's eligibility for retirement insurance. A restriction identical to the one which barred these plaintiffs' eligibility was recently found unconstitutional by the Supreme Court, *Jimenez v. Weinberger*, 417 U.S. 628 (June 19, 1974), and defendant has conceded that the section involved in this case, 42 U.S.C. §416(h)(3)(A), is likewise invalid. An affidavit sworn to by the Deputy Director of the Social Security Administration's Bureau of Retirement and Survivors Insurance states that the *Jiminez* decision permits, "prospectively", an otherwise qualified illegitimate minor to obtain child's insurance benefits without fulfilling the requirements of §416(h)(3)(A). The affidavit explains that "appropriate instructions necessary to effectuate" the change in policy due to *Jiminez* "are being prepared". Defendant contends that his admission of unconstitutionality moots plaintiffs' request for injunctive relief, prevents plaintiffs' claims from being typical of those of the class they seek to represent, and deprives this Court of jurisdiction in that defendant's sovereign immunity precludes a suit for retroactive benefits, the only type of relief which, defendant maintains, plaintiffs can still seek. Defendant also asserts that even assuming sovereign immunity does not bar plaintiffs' retroactive benefits claim, plaintiff cannot base jurisdiction over this claim on any federal statute. Plaintiffs have vigorously opposed defendant's motion to dismiss and have filed for certification of class and for summary judgment on the issue of liability.

Contrary to defendant's arguments, we are of the opinion that plaintiffs' prayer for an injunction is not

moot, that this Court can hear a claim for retroactive benefits as a part of plaintiffs' injunction claim, and that plaintiffs are proper representatives, under Federal Rule 23(b)(2), of a class of those who have or will be denied child's insurance benefits pursuant to 42 U.S.C. §416(h)(3)(A). We will therefore certify plaintiffs as representatives of such a class and grant plaintiffs' motion for summary judgment on the issue of liability, reserving for a future proceeding the tasks of determining the form and scope of an injunction and the amount of retroactive benefits to which the named plaintiff may be entitled.

a. *The Challenged Statute.*

An examination of the statutory scheme for determining eligibility for child's insurance is required before the facts of this case can be understood. The Social Security Act provides that every dependent "child" of a wage earner entitled to old-age insurance may file for child's insurance benefits. 42 U.S.C. §402(d). The statute's definition of "child" includes any natural or adopted child and any individual who could qualify as a child under the intestacy laws of the wage earner's state of domicile, 42 U.S.C. §416(h)(2)(A), or who is the offspring of a marriage which would be valid but for non-obvious defects in the marriage ceremony. 42 U.S.C. §416(h)(2)(B). If a minor, such as each of the plaintiffs herein, does not qualify as a child under this definition he or she may still obtain benefits if the wage earner upon whose account they are claiming has acknowledged his

paternity or if a court has declared such paternity or required support payments because of such paternity *at least one year prior to* the time the wage earner first became entitled to retirement insurance benefits (Or reaches age 65, whichever is earlier).

The Supreme Court in *Jimenez*, cited *supra*, found unconstitutional 42 U.S.C. §416(h)(2)(B), which required that illegitimate children whose relation to the wage earner had not been acknowledged or officially declared before the wage earner became eligible for disability benefits could not obtain child's insurance benefits. The Court stated that this section, when read in conjunction with 402(d)(3)(A) and 416(h)(2)(A) and (h)(2)(B), discussed *supra*, created two classes of illegitimate children born after the wage earner's eligibility for disability payments. The first class consisted of after-born illegitimates who could qualify for benefits because they could inherit property under state intestacy laws or because their parents' marriage was technically invalid. The second class consists of all remaining after-born illegitimate children, who were conclusively barred from benefits by 42 U.S.C. §416(h)(3)(B). The Court found that this classification of after-born illegitimates was not rationally related to any legitimate interest of the Social Security Administration and thus deprived the second class of equal protection of the laws guaranteed them by the Fifth Amendment.

b. *Facts.*

The following facts are undisputed. The named plaintiff Jennifer Rhodes was found to be the natural

daughter of Willie Singleton by a Court of Common Pleas of the County of Philadelphia on October 20, 1969. Jennifer Rhodes, by her mother, Ellanoria Rhodes, first filed for child's insurance benefits under 42 U.S.C. §402(d) on November 29, 1974, as a dependent child of the insured wage earner Willie Singleton, who himself had become entitled to Social Security retirement benefits in September, 1967. That application, and a later re-application, were denied by the Social Security Administration because the finding of paternity had not been made at least one year prior to the wage earner parent's attainment of age 65 or entitlement to benefits as was required by 42 U.S.C. §416(h)(3)(A). Willie Singleton died in January, 1974, and his child, Jennifer Rhodes, applied for and is presently receiving survivor's benefits under 42 U.S.C. §416(h)(3)(C).

Named plaintiffs Clara and Bernice Brogdon are the youngest of five acknowledged, illegitimate children of Pearl Brogdon and the insured wage earner Clarence Glasgow, who himself became entitled to retirement benefits in October, 1962. In August, 1965, Clarence Glasgow filed applications on behalf of Clara and Bernice Brogdon, as well as the three older children, for child's insurance benefits under 42 U.S.C. §402(d). Those applications were initially denied, but after a hearing held in September, 1967, the three older children were found to be entitled to benefits under 42 U.S.C. §416(h)(3)(A). Clara and Bernice Brogdon were denied those benefits for the failing to meet the time requirements of 42 U.S.C. §416(h)(3)(A), in that they were born after the wage earner parent, Clarence

Glasgow, had become entitled to Social Security benefits. Clarence Glasgow died on December 24, 1968.

The complaint in this matter was filed in this Court on June 17, 1974, two days before the Supreme Court announced its opinion in *Jiminez*.

I.

Subject Matter Jurisdiction

Defendant contends that the affidavit stating that 42 U.S.C. §416(h)(3)(A) is invalid and that "appropriate regulations are being prepared" to implement a change in the Bureau's policy moots plaintiffs' request for declaratory and injunctive relief, leaving retroactive benefits as the only remedy remaining to plaintiffs. Defendant further asserts that plaintiffs cannot pursue this remedy against the federal government both because the government as a sovereign has not consented to such a suit and because plaintiffs have alleged no jurisdiction statute which will support such a suit.

i. mootness.

It would seem that defendant's admission is insufficient to meet the criterion of mootness established by *United States v. W.T. Grant*, 345 U.S. 629 (1953). *Grant* set forth three criterion for a finding of mootness: the good faith of the announced intent to discontinue the challenged activity; the effectiveness of the discontinuance; and, in certain cases, the character

of the past violations. Plaintiffs have raised substantial questions as to the effectiveness of defendant's discontinuance. For example, defendant has not specified the means by which its policy will change nor has it indicated how those who have been denied benefits in the past and who are still eligible would be notified of this change, if, indeed, defendant plans to notify them at all. The fact that these issues, among others, remain unresolved indicates that there is room for an injunction in this case and that plaintiffs' claim for injunctive relief has not been mooted.

ii. sovereign immunity.

Defendant's position is that the retroactive benefits sought by plaintiffs are, in essence, money damages, and thus cannot be awarded against the United States without its consent. In support of this proposition defendant relies heavily on *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682 (1948). In *Larson*, the Court upheld the dismissal of a suit to enjoin the Administrator of the War Assets Administration from selling elsewhere surplus coal contracted for by the plaintiff therein. The Court ruled that the doctrine of sovereign immunity bars a suit for specific performance against a federal officer acting in his official capacity. However, the Court went on to outline three situations where sovereign immunity would not bar such a suit: where the federal officer is acting in his own capacity as an individual; where he is acting beyond the scope of his official duties; and where, as here, his actions are taken under a statute or

order claimed to be unconstitutional. As an exception to these exceptions, the Court stated:

> "Of course, a suit may fail, as one against the sovereign . . . if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. *North Carolina v. Temple*, 134 U.S. 22, 33 L.Ed. 849, 10 S.Ct. 509 (1890)." 337 U.S. at 691 (fn.).

First, this "unquestionably sovereign property" caveat seems to have vanished in subsequent Supreme Court discussions of sovereign immunity. *State of Hawaii v. Gordon*, 373 U.S. 57 (1963); *Dugan v. Rank*, 372 U.S. 609 (1963); *Malone v. Bowdoin*, 369 U.S. 643 (1962). In *Malone*, cited *supra*, the Court stated:

> "[*Larson*] expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer's action is 'not within the officer's statutory powers or, if within those powers, only if those powers, or their exercise in the particular case, are constitutionally void' ". 369 U.S. at 647.

Second, it is unclear whether *Larson* and its progeny even apply to a case such as the present one. Each of the Supreme Court cases cited above, as well as the *North Carolina v. Temple case*, cited in *Larson*, involved specific performance suits over property owned or seized by the sovereign in which the plaintiff claimed an interest. The Court in *Larson* distinguished these suits from suits for monetary damages by stating:

> "It is argued that the principle of sovereign immunity is an archaic hangover not consonant

> with modern morality and it therefore should be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages . . . but the reasoning is not applicable to suits for specific relief. . .
>
> For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the government from acting, or to compel it to act." 337 U.S. at 703-04.

Although retroactive benefits are a form of equitable relief, see discussion at pages 11-12. They are more akin to damages than to the type of specific relief which the Court was discussing.

Leaving aside the question of whether the Courts "unquestionably sovereign property language" applies to an award of money damages as well as a grant of specific performance, it has not been viewed as a bar by those courts awarding retroactive benefits in Social Security cases similar to this one. *Salfi v. Weinberger*, 373 F. Supp. 961 (N.D. Cal. 1974), *cert. granted*, __U.S.__; *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1969 (1972); *Morris v. Richardson*, 346 F.Supp. 494 (N.D. Ga. 1972), *vac. and rem. on other grounds*, 409 U.S. 464 (1973). In fact, the Three-Judge Court in *Jimenez*, upon the remand of that case from the Supreme Court, ordered the Secretary of H.E.W. to provide retroactive benefits to those who had been denied benefits since the suit's inception.

Defendant cites the recent case of *Edelman v. Jordan*, 39 L.Ed. 2d 662 (1974), in support of its

sovereign immunity claim. However, *Edelman* involved an award of benefits unconstitutionally denied in the past from a state Treasury. The Court said that the Eleventh Amendment prohibited such an award even if it was a form of equitable restitution. We do not believe that *Edelman,* which was decided on Eleventh Amendment grounds rather than on the more general sovereign immunity doctrine, should be construed to bar any suit which would compel payments from the federal treasury.

iii. statutory basis of jurisdiction.

Plaintiffs acknowledge that the terms of the Social Security Act itself preclude them from suing upon that Act, 42 U.S.C. §§405(g), 405(h). Section 405(g) states:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

Section 405(h) states:

> "The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearings. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section

> 41 of Title 28 [the section of the Judicial Code defining the jurisdiction of the Federal district courts which has been superseded by section 1331 *et seq.* of new Title 28 U.S.C.]. to recover on any claim arising under this subchapter."

Sections 404.901 *et seq.* of Social Security Administration Regulations No. 4, 20 C.F.R. 404.901 *et seq.*, set forth a four-step administrative process by which a claimant for benefits under the Act may obtain a "final decision" of the Secretary. Following an initial determination on his claim (Section 404.095 of Social Security Administration Regulations No. 4, 20 C.F.R. 404.905) a dissatisfied claimant may obtain reconsideration (Section 404.914, 20 C.F.R.404.914). Subsequent to a reconsidered determination, an individual may request a hearing *de novo* before an independent administrative law judge (Section 404.197, 20 C.F.R. 404.917) and review by the Appeals Council of the Social Security Administration (Section 404.945, 20 C.F.R. 404.945).

None of the plaintiffs in the instant case obtained a final decision of the Secretary. Plaintiff Rhodes pursued her claim through a reconsideration determination dated March 22, 1974, and then commenced this action. The claim filed on behalf of Clara and Bernice Brogdon was not pursued subsequent to the decision of the hearing examiner on November 27, 1967. Thus, there has been no "final decision" pursuant to section 205(g).

However, defendant goes on to claim that §405(h) prevents judicial review of Social Security Administration actions under any other statutes unless[1] a claimant has fulfilled the requirements of §405(g). With one exception[2], the courts have declined to accept this position where the parties have had an opportunity to develop a complete factual record in the administrative agency proceedings, where the only question remaining is a constitutional one on which the agency has no special expertise, and where recourse to the agency's review procedures would be futile. *Salfi v. Weinberger*, 373 F. Supp. 961 (N.D. Cal. 1974), *cert. granted* __U.S.___(1974); *Williams v. Richardson*, 347 F.Supp. 544 (W.D. N.C. 1972); L. Jaffe, Judicial Control of Administrative Action 424-458 (1965).

This Court unquestionably has jurisdiction over plaintiffs' prayer for declaratory and injunctive relief under 28 U.S.C. §1361. Mandamus clearly lies to compel the Secretary to cease enforcing an unconstitutional statute. *Richardson v.* U.S., 465 F.2d 844, 850

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[1]Defendant also contends that §405(h) bars review under any other jurisdictional statute regardless of whether §405(g) has been satisfied. This position is universally rejected. Griffin v. Richardson, 346 F.Supp. 1226 (Md. 1972), *aff'd* 409 U.S. 1069 (1972); Morris v. Richardson, 346 F.Supp 494 (N.D. Ga. 1972), *vac. and rem. on other grounds*, 409 U.S. 464; Severance v. Weinberger, 362 F.Supp. 1348 (D.C. D.C. 1973).

[2]The exception is Bartley v. Finch, 311 F.Supp 876 (E.D. Ky. 1970), where a Three-Judge Court ruled that it lacked jurisdiction because plaintiffs failed to exhaust their administrative remedies. The Court then went on to decide against plaintiffs on the merits. On appeal, the Supreme Court affirmed on the merits, 404 U.S. 980 (1971), thus implicitly deciding that jurisdiction was proper.

(3rd Cir. 1972), *rev'd on other grounds*, ___U.S.___41 L.Ed. 2d 678 (1974). However the jurisdictional basis of plaintiffs' retroactive benefits claim is more problematical. Several Courts faced with attacks on the Social Security Act's eligibility sections have awarded benefits retroactively as part of a decree enjoining the application of the section found to be unconstitutional. See cases cited at p. 8. These courts thus seem to find the power to award such benefits from the same source from which they find the power to issue an injunction, i.e., their general equity powers.

Once jurisdiction exists for the issuance of an injunction under §1361, and liability has been found, a court may, under certain circumstances, give the injunction retroactive effect. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). This power, entailing as it does the payment of past benefits, does not appear to have been diminished by the Supreme Court in *Edelman v. Jordan*, ___U.S.___, 39 L.Ed. 2d 662 (1974), discussed supra, pp. 8-9. While the majority decision in that case declared that a court could not avoid the Eleventh Amendment's stricture against awarding "equitable restitution", it did not address the question of whether the award of past benefits as equitable restitution was proper in the absence of Eleventh Amendment considerations. Therefore, this Court will follow those courts which have found the power to award retroactive benefits as inherent in their power to issue an injunction.

II.

Class Action Status.

Plaintiffs have moved for certification as representatives of a class consisting of all those who have been, are being, or will be denied child's insurance benefits solely because of 42 U.S.C. §416(h)(3)(A). Defendant argues that since all named plaintiffs are presently receiving survivor's benefits and are thus not entitled to prospective child's insurance benefits, their claims are not typical of those of the class. We find this argument unconvincing. Plaintiffs are being directly affected by the enforcement of the section in question and can only recover the benefits allegedly due them if the operation of the challenged section is enjoined. The named plaintiffs thus have the same goal as those class members who will be entitled to benefits in the future—the cessation of the section's enforcement.

However, while plaintiffs appear to be adequate class representatives for purposes of Rule 23(b)(2), their claim for retroactive benefits on behalf of the entire class exceeds the relief available to the class in a (b)(2) class action. *Paddison v. Fidelity Bank*, 60 F.R.D. 695 (E.D. Pa. 1973). *Paddison* established the principle, in this Court at least, that the Rule 23(b)(2) category is most efficiently and faithfully used to determine the legality of a practice of general applicability and should not be burdened with such typically (b)(3) problems as determination of individual damage claims, whether or not such claims are styled as equitable. *Paddison* limits a Rule (b)(2) class representative to injunctive relief, as well as any monetary damages which he himself may

have suffered, and leaves the plaintiff free to apply for (b)(3) certification if and when defendant's liability is determined in plaintiff's favor. The fact that we have found, as discussed above, see pp. 11-12, that our jurisdiction to award past benefits depends on equitable principles does not change this Court's policy of postponing the litigation of class members' monetary claims until the determination of defendant's liability. As stated in *Paddison:*

> "Whether past money damages can be properly styled 'equitable relief' for some purposes, this Court is convinced that for the purposes of Rule 23 the problems created by past monetary damages are (b)(3) problems which should be resolved by the criteria of (b)(3) in a separate and explicit determination in each case." 60 F.R.D. at 698.

Those courts awarding retroactive benefits have not clearly articulated the circumstances which warrant such an award, nor have they decided in a uniform fashion how retroactive retroactivity should be. *Salfi v. Weinberger*, cited *supra*, p. 8 (benefits payable from date of original entitlement); *Griffin v. Richardson*, cited *supra*, p. 8 (payable from date of original entitlement); *Jiminez v. Weinberger*, cited *supra*, p. 8 (benefits payable from date of filing of suit only).

There is no valid reason why these questions, as well as the question of how much benefits each individual class member is entitled to, should be resolved in a (b)(2) context, particularly when it is remembered that under (b)(2) the class members will receive no notice that their individual claims are being adjudicated. For these reasons, we will certify plaintiffs as class representatives under Rule 23(b)(2), and withhold

considering the question of whether the class members should be awarded retroactive benefits or the amount of any such award until such time as plaintiffs are certified under 23(b)(3).

III.

Summary Judgment.

Plaintiffs have moved for summary judgment on the constitutionality of 42 U.S.C. §416(h)(3)(A). It is clear from a reading of the pleadings and affidavits, including the affidavit of the Deputy Director of the Retirement and Survivors Insurance Bureaus, that there are no contested facts and that section 416(h)(3)(A) is constitutionally invalid.

IV.

Three-Judge Court.

If, as is the case here, the challenged federal statute is clearly and unquestionably unconstitutional, a three-judge court need not be convened. *Bailey v. Patterson*, 369 U.S. 31 (1962).

This would be true even if defendant had not conceded unconstitutionality, but his admission removes all doubt on this issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JENNIFER M. RHODES suing by her next of friend ELLANORIA RHODES,	:	CIVIL ACTION
and	:	
CLARA and BERNICE BROGDON, suing by their next of friend PEARL BROGDON	:	
v.	:	
CASPAR WEINBERGER, Secretary of Health, Education and Welfare	:	NO. 74-1511

ORDER

AND NOW, to wit, this 21st day of January, 1975, the motion of defendant to dismiss the above captioned action is hereby DENIED.

Plaintiff's motion for certification of class under Rule 23(b)(2) is hereby GRANTED, and plaintiffs are hereby certified as representatives of all those within the Eastern District of Pennsylvania who have been, are being, or will be denied child's insurance benefits solely because of 42 U.S.C. §416(h)(3)(A).

Plaintiff's motion for summary judgment on the issue of liability is hereby GRANTED both as to the named

plaintiffs and as to the class members.

There shall be further proceedings to determine the form and scope of an injunction, to determine whether defendant should be ordered to pay the named plaintiffs those benefits to which they would have been entitled but for §416(h)(3)(A), and to determine the amount of such benefits, if any.

AND IT IS SO ORDERED.

/s/Clarence C. Newcomer, J.
Clarence C. Newcomer, J.